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No. 05-355

In The
Supreme Court of the United States

SSW, INC.,

Petitioner,

v.

REGENTS OF THE UNIVERSITY OF CALIFORNIA,

Respondent.

On Petition For Writ Of Certiorari
To The Supreme Court of California

REPLY IN SUPPORT OF PETITION FOR WRIT OF CERTIORARI

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RESPONSE TO OPPOSITION

I. THIS COURT HAS JURISDICTION UNDER § 1257(a) BECAUSE THE PETITIONER CLAIMS THE VIOLATION OF A RIGHT SPECIALLY CLAIMED UNDER FEDERAL LAW.

The Regents' argument that there is no basis for jurisdiction is incorrect and must be rejected. First, the Regents' construction of 28 U.S.C. § 1257(a) would limit its grant of jurisdiction to instances in which the terms of a legislative or executive enactment are called into question. In doing so, the Regents ignore the very terms of § 1257(a) that authorize review under three sets of circumstances, the third of which is "where any . . . right . . . is specially set up or claimed under the Constitution . . . or statutes of . . . the United States." *Id.* § 1257(a); *see also* 2 *Fed. Proc., L. Ed.* § 3:116 (recognizing the Supreme Court's jurisdiction to review state court decisions by writ of certiorari to exist in any of above three instances). This basis for jurisdiction stands on footing equal to that of the two provisions addressing the validity of state and federal statutes and treaties, and is not, as the Regents contend, simply a subset of the provision relating to a state statute's validity.[1]

Most compelling in this regard is the Court's recent review of a final judgment of the South Carolina Supreme Court in *Green Tree Financial Corp. v. Bazzle*, 539 U.S. 444 (2003). The decision under review in *Green Tree* dealt

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[1] This Court has found jurisdiction, pursuant to § 1257, in numerous cases where the petitioner challenged judicial application of an otherwise valid state statute. *E.g., Cohen v. California,* 403 U.S. 15, 17-18 (1971); *Warren Trading Post v. Arizona Tax Comm'n,* 380 U.S. 685, 686 & n.1 (1965); *Bantam Books, Inc. v. Sullivan,* 372 U.S. 58, 61 n.3 (1963); *Dahnke-Walker Milling Co. v. Bondurant,* 257 U.S. 282 (1921).

exclusively with the state court's construction (under state common law) of an arbitration agreement and whether that construction violated the Federal Arbitration Act, 9 U.S.C. §§ 1-16 ("FAA"). Thus, the Court has rejected soundly the Regents' position that this Court has no jurisdiction over claims arising from the judicial construction of a private agreement.

The Court's jurisdiction to review state court decisions not directly challenging the constitutionality of statutory enactments is critical. In fact, the Court has an "independent obligation" to scrutinize state judgments that defeat the enforcement of federal rights. *Howlett v. Rose,* 496 U.S. 356, 366 n.14 (1990). "The reasons for that rule rest on nothing less than this Court's ultimate authority to review state-court decisions in which 'any title, right, privilege, or immunity is specially set up or claimed under the Constitution.'" *Id.* To hold otherwise would create an undeniable and intolerable opportunity for state courts to avoid the jurisdiction of the United States Supreme Court.

Second, the Regents disingenuously conclude that "Petitioner does not claim any right, privilege or immunity under the Constitution, a treaty, or a statute of the United States, nor the validity of any state law." (Resp. in Opp'n at 1.) Yet, the Regents' own Statement of the Case notes the Federal Arbitration Act, the very statute under which the Petitioner claims a right. (Resp. in Opp'n at 3.)

While it is true that SSW does not disagree with the rule articulated in *Volt Information Sciences, Inc. v. Board of Trustees*, 489 U.S. 468 (1989), that concession does not defeat jurisdiction in this case because § 1257(a) specifically authorizes review of the California Supreme Court's ruling that runs afoul of the decision in *Volt.* It is in this respect

that the Petitioner challenges the application of Cal. Code Civ. Proc. § 1281.2(c) as a violation of federal law.[2]

II. THIS CASE PRESENTS SUBSTANTIAL ISSUES OF FEDERAL LAW THAT WARRANT REVIEW.

The Regents' assertion that the California appellate court decisions "simply follow settled federal" law utterly ignores the manner in which those courts have distorted well-established federal law relating to the supremacy of the federal arbitration law. The resulting impairment of the rights afforded by federal arbitration law is evident from a comparison of the rule articulated by this Court in *Volt* and that more recently set forth by the California Supreme Court in *Cronus Investment, Inc. v. Concierge Services, LLC*, 107 P.3d 217 (Cal. 2005). While *Volt* established that the FAA will permit the enforcement of agreements to arbitrate under "different rules than those set forth" in the FAA as long as the parties contractually specify those rules, 489 U.S. at 479, the decision in *Cronus* specifies that California rules will apply unless the parties "expressly designate that any arbitration proceeding should move forward under the FAA's procedural provisions rather than under state procedural law." App. 50a. Thus, the California Supreme Court has categorically imposed California law (including the stay provision of section 1281.2(c)) upon parties to an arbitration agreement unless the parties expressly assert their

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[2] In their argument that jurisdiction is lacking because 9 U.S.C. § 16(a) does not grant jurisdiction to the Supreme Court, the Regents fail to recognize that § 16(a) is referenced with respect to jurisdiction because it addresses the "finality" requirement necessary to invoke jurisdiction under § 1257(a). Moreover, the finality requirement is also satisfied in this case by virtue of the Cal. Code Proc. § 1294 which makes appealable "an order dismissing or denying a petition to compel arbitration." *See* App. 8a at n.4 (taking jurisdiction of this case under section 1294(a) of the appeal from the order denying SSW's motion to compel arbitration).

right to enforcement as intended by the FAA and this Court's decision in *Volt*.

The conflicting rules announced in *Volt* and *Cronus* are not only inconsistent, they are mutually exclusive because they designate ***different*** bodies of law to be followed in the absence of a specific contractual provision. It goes without saying that law as established by this Court will not be relegated from its position of prominence by state courts that flaunt federal law.

A. The Contract Construction Imposed Upon SSW Contravenes The Terms Of SSW's Subcontract And, Thus, Cannot Survive Judicial Scrutiny In Light Of The FAA.

The opportunity and need to grant a writ of certiorari in this case is not diminished by the Regents' contention that this is just a case about contract interpretation. Even if that is the case, which SSW contends it is not, judicial scrutiny of contract construction is not beyond the permissible scope of review by the Supreme Court. Without repeating SSW's earlier discussion on this point, the deference generally afforded state court decisions of that type is not unlimited and this Court can, and should, review those determinations if they infringe upon important federal rights. *See also* Pet. at 24-25.

Indeed, former Chief Justice Rehnquist urged this Court to undertake just such a review in *Green Tree*, 539 U.S. 444, 459 (2003) (Rehnquist, C.J., dissenting and joined by O'Connor, J. and Kennedy, J.). In his dissent, the former Chief Justice concluded that the contract interpretation given by the South Carolina Supreme Court to an arbitration provision was "contrary to the express agreement of the

parties" and did not, therefore, enforce the agreement according to its terms. *Id.* Therefore, in his view, the judgment springing from that erroneous construction should have been reversed.

The dissenting opinion in *Green Tree* stands in stark contrast to the majority's refusal to scrutinize the state court's contract interpretation in *Volt*. The Court will recall that Chief Justice Rehnquist wrote the majority opinion in *Volt*. Thus, the views held and expressed by Chief Justice Rehnquist in those two cases establishes that, when the record so warrants, Supreme Court review of the interpretations given to contracts involving arbitration is both permissible and appropriate. The instant case presents just such a circumstance.

Second, no principled analysis would render the term "prevailing Arbitration Law" as referring "automatically" to California arbitration law in this context. In fact, this Court would likely find just the opposite to be true under the principles announced in other cases involving the interpretation of arbitration provisions.

The provisions of the arbitration clause refer to four ***different*** sets of laws or rules that, when taken together, preclude the interpretation given by the lower court and dictate the conclusion that "prevailing Arbitration Law" is intended to be the FAA.[3] Each calls out a body of law ***separate and distinct*** from the law to be applied under the other portions of the arbitration provision:

(i) The arbitration is to be "conducted" in accordance with the AAA rules, supplemented by sections

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[3] For the text of the arbitration provision, *see* Pet. at 7 n.2.

1282.6, 1283, and 1283.05 of the California Civil Code rules (addressing the use of subpoenas);

(ii) The *arbitrators* are to be "bound by and apply" California law, and;

(iii) The arbitration is to be "specifically enforceable" in accordance with prevailing "Arbitration Law."

Notably, the only reference to California law in the arbitration provision directs the *arbitrators* to apply California law. That provision is not a generic reference to the law to be applied to the parties' dispute. Moreover, the question of *whether* the arbitration agreement is enforceable is to be determined by "Arbitration Law," without any reference to California.[4] It is obvious that the parties specifically identified different laws to govern different aspects of the agreement to arbitrate and that the conclusion pressed by the Regents is hardly "automatic."

B. SSW's Reliance Upon *Cronus* Neither Distorts The Decision Nor The Role Of That Decision As It Relates To SSW's Petition For Writ Of Certiorari.

SSW has not misapprehended the effect of the reliance placed on *Cronus* by the California Supreme Court in

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[4] The Subcontract's incorporation of "Arbitration Law" rather than California law with respect to enforcement is even more significant when considered in conjunction with the general choice-of-law clause that specifies that "California law" will govern the Subcontract. One must wonder why, if the parties really intended for "Arbitration Law" to be California law, an additional enforcement term was necessary? In fact, had the parties intended to incorporate the entirety of California's law on arbitration, why was it necessary to expressly call out the three discovery provisions or any other reference to the law to be applied or followed by the arbitrators? In short, it *was* necessary to do so because the parties intended the FAA to govern the enforcement of the arbitration provision.

dismissing SSW's petition for review. The Regents erroneously conclude that the manner in which the California Supreme Court dismissed review of SSW's appeal automatically makes the opinion of the California Court of Appeal the final word on SSW's case. (Resp. Br. in Opp'n at 9.)

The Regents fail to address, however, the fact that the California Supreme Court did *not* simply dismiss SSW's petition. Rather, the court dismissed SSW's petition "[i]n light of the decision in *Cronus Investments, Inc., v. Concierge Services.*" App. 1a. In so doing, the California Supreme Court specifically identified *Cronus* as the law it viewed as controlling the issues raised by SSW's appeal.

The California Supreme Court could have dismissed SSW's petition for review in a number of manners. First, it could have dismissed review without comment, thereby indicating that the decision of the court of appeal stood but that there was no reason to publish the court of appeal decision. The court did not do so. Instead, the appeal was disposed of in light of *Cronus*.

Second, the court could have dismissed SSW's appeal and ordered the publication of the court of appeal decision, thereby indicating the court of appeal decision was correct and of some value as precedent. Again, the court did not do so.

Third, the court could have dismissed SSW's appeal "in light of" some controlling principle, case, or statute, thereby establishing that principle or case as the law of the land and as the basis for dismissal of SSW's appeal. The California Supreme Court did precisely this. In fact, this method of

disposal of SSW's appeal was not an anomaly but has been employed in other cases. *See* Pet. at 8-9 n.4.

More importantly, in establishing *Cronus* as the basis for its decision on SSW's appeal, the court fully articulated the very presumption that begs this Court's review. The California court has made quite clear that, when presented with an arbitration agreement, the court will apply California procedural and arbitration law, including § 1281.2(c), *unless* the parties expressly designate the FAA to govern. App. 50a. Such a holding and rule of contract interpretation does not resolve doubts in favor of arbitration. Nor does it indicate any deference to the FAA. In fact, it eviscerates rights supposedly guaranteed to contracting parties under the FAA and this Court's precedents, including *Volt*.

Moreover, it appears unlikely that an arbitration agreement has yet been drafted that will satisfy the California court's requirement for such a designation. This Court's review of SSW's case is crucial because it takes little effort to mouth words indicating "a careful examination of the objective intent of the contracting parties." As is evident, the rights guaranteed by the FAA are easily nullified by a court's willingness to presume that parties intended to incorporate section 1281.2(c) into an arbitration agreement where the plain language of the agreement clearly indicates quite the opposite intent or, at a minimum, some ambiguity.

C. The Presumption Favoring California Law Is Evident In The Recent Decisions Of The California Appellate Courts And Warrants Review By This Court.

It is, indeed, fanciful to suggest (as the Regents do) that the California courts merely have applied the law to the

parties' stated intentions in the arbitration agreements. Time and again, the California appellate courts have disregarded the parties' stated intent and looked for an angle pursuant to which section 1281.2(c) could be applied. Despite the Regents' contentions, the cases cited by SSW cannot be reconciled to the requirement of *Volt* that the FAA shall apply unless the parties expressly indicate otherwise.

First, the Regents merely repeat what SSW set forth in its Petition regarding *Mount Diablo Medical Center v. Health Net of California Inc.*, 124 Cal. Rptr. 2d 607 (Cal. Ct. App. 2002); that is, that *Mount Diablo* created a rule that the designation of law with respect to the "enforcement" of a contract would also apply to the enforcement of the arbitration agreement. That rule was not, however, followed when subsequent cases presented contracts that specified a choice of law *other than California* for the enforcement of the arbitration agreement. *See* Pet. at 19-20.

Second, the decision in *Discover Card v. Superior Court of Los Angeles*, 113 P.3d 1100 (Cal. 2005), confirms, as SSW contends, that the California courts will *not* abide by the parties' stated intent to use law *other than* California law to govern the enforcement of an arbitration provision. In that case, the parties undisputedly selected Delaware law, yet the California Supreme Court disregarded that designation. Instead, the matter was remanded for a conflict of law analysis to determine whether *California* law should apply even though the contract designated Delaware law.

The Regents' discussion of *Frankhouse v. Roth Capital Partners, LLC*, No. G033765, 2005 WL 1406004 (Cal. Ct. App. June 16, 2005), cannot overcome the fact that the parties had expressly designated New York law, and that the state court disregarded that choice of law in lieu of

California's law. As discussed in the opening Petition, under federal jurisprudence, any ambiguity in the law should have been resolved *in favor of arbitration*.[5]

Judicial scrutiny will reveal the fallacy of the Regents' closing suggestion that the California courts have simply followed the express intent of the parties. As a litany of cases now demonstrate, the persistent pattern in those courts has been to frustrate and disregard the stated intent of the parties, and to find some alternative theory by which to invoke the stay provision of section 1281.2(c) despite the clarity of the parties' agreement to invoke some other law.

CONCLUSION

Wherefore, the petition for writ of certiorari should be granted and the decisions below reversed.

Dated this 31st day of October, 2005.

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[5] The Regents' assertion that *Frankhouse* may not properly be cited or considered by this Court because it was an "unpublished opinion" should be disregarded because the rule is not binding upon federal courts *See, e.g., In re Temporomandibular Joint Implants Lit.*, 113 F.3d 1484, 1493 n.11 (8th Cir. 1997); *Ortiz-Sandoval v. Gomez*, 81 F.3d 891, 895 (9th Cir. 1996).